Supreme Court, U. S.
FILED
JUN 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

..... Term, 1976

No. 75-1760

FRANK C. HILTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinions Below

The opinion of the court of appeals (Appendix A) is not reported as yet. The denial of rehearing *en banc* (Appendix B) is not reported as yet. The opinion of the district court denying petitioner's motion to suppress is not reported and is attached hereto as Appendix C.

Jurisdiction

The judgment of the court of appeals was entered on March 30, 1976. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 6, 1976 (Appendix B).

This petition for certiorari was filed within thirty days of the date of the denial of the petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Where a grand jury subpoena is prepared by the United States Attorney's office without any authorization from or submission to the grand jury, can such a subpoena represent that the Federal Bureau of Investigation agents are appointed by the grand jury as agents of the grand jury and authorize the seizure of certain bank records?

2. Where the trial court denied motions to suppress and dismiss while stating that ". . . although in doing so we do not rid ourselves of a chill at the base of the spine," and the court of appeals held that its decision should not be taken "as an indication that we condone the practice utilized by the prosecutor in the proceedings below," does the grant of immunity to a witness whose records were also seized by illegal process so tarnish the judicial integrity of the court system as to require a reversal?

3. Does the action of the court of appeals and the trial court in refusing to apply the exclusionary rule to illegally obtained evidence seized pursuant to an unlawful subpoena taint the judiciary with partnership in the official lawlessness of the executive branch?

Constitutional Provision and Rules Involved

The Fourth Amendment to the Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, *papers and effects,* against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (Emphasis added).

Rule 17 (a), Federal Rules of Criminal Procedure, provides in pertinent part:

> "A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena; signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. . . .".

Rule 17 (c), Federal Rules of Criminal Procedure, provides:

> "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

18 U.S.C. §1951 (Hobbs Act) provides:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000.00 or imprisoned not more than twenty years, or both."

Statement

Petitioner, Frank C. Hilton, was Secretary of Property and Supplies of the Commonwealth of Pennsylvania. The federal government was investigating the conduct of his office for alleged Hobbs Act violations. An insurance broker, David Oppenheim, was an alleged source of payments to petitioner. An Assistant United States Attorney for the Western District of Pennsylvania prepared a purported subpoena *duces tecum* directed to any authorized officer of the Keystone Bank in Lower Burrell, Pennsylvania commanding that such officer appear before the grand jury forthwith. Because of the importance of the form of the subpoena, a copy is attached to this brief as Exhibit "A". The subpoena was dated October 1, 1974 and attached to it was a second page directing the authorized officer of the bank to bring the records designated and stating:

> "Said records shall be produced forthwith and said microfilm examination for the copies of these records shall be conducted in the presence of the agents for the federal grand jury who are any authorized Federal Bureau of Investigation agents."

Said subpoena was received by the F.B.I. on October 2, 1974 at 5:00 P.M., and on October 3, 1974 at 10:45 A.M., F.B.I. Agents Robert A. Voege and J. C. Raffety served the purported subpoena; secured the records from the bank; presented the records to the United States Attorney's office and on October 10, 1974, said records were taken to the grand jury by the F.B.I. and a perjury indictment returned against Frank C. Hilton.

Motions to suppress the evidence and to dismiss the indictment were filed and testimony taken. At the hearing on said motions, it was established that the subpoena was prepared in the office of the United States Attorney; that it had never been seen nor submitted to the grand jury nor

authorized by the grand jury;[1] that the F.B.I. agents who executed and served the purported subpoena stated they had no intention of having any authorized officer of the bank appear before the grand jury with the records; that the F.B.I agents would not have left the premises of the bank without obtaining the documents subpoenaed; that after the records were seized, they were taken by the F.B.I. to the Assistant United States Attorney who prepared the subpoena and then presented to the grand jury by the F.B.I. agents on October 10, 1974.

The officers of the bank testified that they would not have surrendered the documents except for the fact that, when the subpoena had been served on them by the F.B.I., the agents stated they would not leave without the subpoenaed records.

The motions to suppress and dismiss were denied by the court below, with the court stating:

---

[1] Assistant United States Attorney Samuel J. Orr testified as follows:

"Q. Mr. Orr, when you dictated that subpoena, did you take it back to the grand jury room and display it to the grand jurors and ask them if that is what they intended for you to do because you are their agent?

* * *

A. No." (43a)

"Q. Before the subpoena was dictated, did the grand jury, or what member of the grand jury said, 'Mr. Orr, we would like to have you prepare a subpoena that would appoint the FBI our agents to go out and get this stuff'?

A. No" (43a-44a)

* * *

"The Court: Here: Nobody has to. He doesn't have to, but we have to have a record here. I think it is pertinent to inquire about the grand jury specifically instructing you to subpoena these specific materials.

The Witness: And I said no.

The Court: And you say 'no.' Secondly, when you prepared this subpoena and its attachment, and said how it was to be executed by any member of the FBI, and the like, was this taken before a grand jury to inform them of what was to be done, or, to get their instructions as to it?

The Witness: No.

The Court: I presume the answer is 'no'?

The Witness: That is correct." (45a)

> ". . . although in doing so we do not rid ourselves of a chill at the base of the spine. We are old enough to remember how other democratic constitutional systems were brought to destruction by the use of their own legal processes" (177a) (Appendix C hereto).

David Oppenheim, whose records had also been illegally seized by the process set forth above, was subpoenaed to appear before the grand jury on March 11, 1975. He moved to quash the subpoena, which motion to quash was denied for the same reason Hilton's motions were denied. Oppenheim appeared before the grand jury on March 11, 1975 and pleaded the Fifth Amendment. He was then taken before the court at 2:00 P.M. on March 11, 1975 and by 2:05 P.M. the court had signed an order granting him immunity on motion of the United States Attorney. The denial of the Oppenheim's motion to quash and the Order granting him immunity are attached to this brief as Exhibits "B" and "C", respectively. Oppenheim then testified before the grand jury and a three-count indictment was returned against Hilton for extortion (Hobbs Act), income tax evasion and perjury. The first indictment was dismissed on motion of the government.

At the non-jury trial, Oppenheim stated categorically he would not have voluntarily surrendered his records nor would he have testified against Hilton except for the procedure followed by the government as outlined above. Objections to the introduction of the evidence were made at the trial and overruled by the court. Among the documents introduced into evidence were: Exhibit 6, Oppenheim's check in the sum of $18,523.49, payable to the Keystone Bank; Exhibit 8, Hilton's record indicating total indebtedness due with interest to July 19, 1972 of $15,710.54; Exhibit 9, Hilton's record indicating total indebtedness due with interest to July 19, 1972 of $2,812.95; and Exhibit 10, a Keystone Bank tape of July 19, 1972 which would indicate that the total of Hilton's distribution was to pay off said loans. At the trial, the United States Attorney stipulated that

Exhibits 1, 1A and 3 through 10, inclusive, all had been produced originally under the subpoena of October 1, 1974 served October 3, 1974.

Appellant was convicted by the court below and sentenced, *inter alia,* on counts 1 and 3 to five years with eligibility for parole at the end of one year, and on count 2 to three years, all sentences to run concurrently.

Reasons for Granting the Writ

This case presents important and related questions concerning the unlawful process used by the United States Attorney's office in the Western District of Pennsylvania which left even the trial court with a "chill at the base of the spine". The procedure also led the court of appeals to

> ". . express grave disquietude with respect to the above discussed aspects of the issuance and 'forthwith' production provisions of the subpoena."

The court of appeals also found that the influence of the United States Attorney's office on federal court grand juries "is not a license to misrepresent". The court also found that despite the motivation of the prosecutor

> "The hard fact is that a misrepresentation was made; the subpoena commanded a forthwith presentation to the grand jury of materials at a time when the United States Attorney's office may or should have known the grand jury would not be in session to receive the documents forthwith."

It is not the issuance of a "forthwith" subpoena which requires judicial correction and intervention, but the fact that it was never intended that the subpoena be used as a subpoena at all but rather that it be executed as a search warrant with the FBI agents seizing the records to bring them to the grand jury some ten days later. It is recognized that this Honorable Court has held in *United States v. Miller,* 19 Cr. L. 3031

(decided April 21, 1976, to No. 74-1179), that bank records are not subject to privacy and Fourth Amendment protection. It is respectfully submitted that in the fact situation here present the bank loan records pertaining to Hilton's account are subject to privacy and although being disclosed to bank employees, such disclosure was not a license to broadcast them publicly. Furthermore, in *United States v. Miller,* footnote 7, the majority of this Honorable Court distinguished the *Miller* case from *Burrows v. Superior Court,* 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974), for the reason that the bank records of the respondent *Miller's* accounts were furnished in response to "compulsion by legal process" in the form of a subpoena *duces tecum* where in the *Burrows* case the bank provided the statements in response to informal oral requests. It is this distinction between *Miller* and the case *sub judice* that must be drawn, namely, that in the instant case there was no "compulsion by legal process" because the trial court and the court of appeals found that the subpoena issued by the United States Attorney's office was in fact being used as a search warrant rather than as the legal process of a subpoena. In addition, in *United States v. Miller,* it was held that:

> "There was no indication (in California Bankers Association v. Schultz) that a new rule was to be devised, or that the traditional distinction between a search warrant and a subpoena would not be recognized."

If the process here used is stamped with the approval of this Honorable Court as well as the court of appeals and the trial court, then prosecutors throughout the country will be unleashed with no constitutional limitation on their access to all bank records of all citizens. They will be authorized to seize bank records without any authority whatsoever under the guise that the records belong to no one who has "standing" to object to their use in criminal proceedings. A more flagrant abuse of the invasion of rights to privacy and failure

to follow constitutional mandates is difficult to imagine. This Honorable Court has consistently refrained police officers from violating the constitutional rights of defendants, recognizing the spirit of the Constitution of the United States and the fear of our Founding Fathers in permitting law enforcement agents to proceed with unbridled discretion. *Aguilar v. Texas,* 378 U.S. 108, 94 S.Ct. 1509 (1964), *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969), and *United States v. Harris,* 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723 (1971) clearly express the philosophy that the rights of citizens guaranteed by the Bill of Rights require strict adherence to constitutional mandates. As stated by Mr. Justice Frankfurter in a concurring opinion in *Malinski v. People of the State of New York,* 324 U.S. 401, 65 S.Ct. 781 (1945):

> "The history of the American freedom is, in no small measure, the history of procedure."

It has also been held in *Durbin v. United States,* 221 F.2d 520, 522 (C.A.D.C. 1954), that the United States Attorney's office cannot issue grand jury subpoenas for the purpose of conducting their own inquisition.

In *California Bankers Association v. Schultz,* 416 U.S. 21, 94 S.Ct. 1494 (1974), the majority opinion held that the legislative history and the regulations of the so-called Bank Secrecy Act of 1970 make specific reference "to the fact that access to the records is to be controlled by existing legal process". 94 S.Ct. at 1513. In the present case there was no existing legal process even pretended to be used by the United States Attorney's office. Mr. Justice Powell and Mr. Justice Blackmun in joint concurring opinions held:

> "At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy" 94 S.Ct. at 1526.

Mr. Justice Douglas in his dissent stated:

> "Customers have a constitutionally justifiable expectation of privacy in the documentary details of the financial transactions reflected in their bank accounts" 94 S.Ct. at 1527.

Mr. Justice Marshall in his dissent refers to the admonition in *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886), which is most apposite to the instant case and in which it was held:

> " 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure' " 94 S.Ct. at 1533.

Mr. Justice Marshall also cautioned that:

> "Our Fourth Amendment jurisprudence should not be so wooden as to ignore the fact that through micro-filming and other techniques of this electronic age, illegal searches and seizures can take place without the brute force characteristic of the general warrants which raised the ire of the Founding Fathers" 94 S.Ct. at 1534.

As stated in *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511:

> "The Fourth Amendment protects *people*, not places."

A depositor or customer of a bank has a right to expect that his transactions with the bank will not be disclosed except in accordance with the proper legal procedures. See 92 A.L.R. 2d 900 *et seq.* English decisions tend toward the existence of a qualified duty on the part of a bank to keep the confidence of its customer or depositor respecting his financial condition. 10 Am. Jur. 2d §332 states:

> "It is the usual practice for depositors and customers of a bank to refer others to the bank for information as to their financial responsibility. To give such information to third persons or to the public at the instance of customer or depositor is certainly not beyond the scope

> of banking powers. It is a different matter, however, when such information is sought from the bank without the consent of the depositor or customer of the bank. Indeed, it is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons without the consent of the customer, express or implied, either the state of the customer's account or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by court order, the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it . . . ".

There can be no doubt that if the Keystone Bank, Lower Burrell Branch, disclosed the loan transactions and payments of petitioner to the public, Hilton would have a right to sue for the violation of his right to privacy and the confidentiality of the disclosures made to the bank. Rooted in English law prior to the adoption of the Fourth Amendment, it should be obvious that such a right to privacy is embodied in the spirit of the Fourth Amendment.

The use of the illegally seized evidence in this case is further tarnished by the fact that Oppenheim moved to suppress the evidence and his motion was denied. The executive branch, which had illegally and unlawfully seized his records, then moved the court to grant him immunity under a statute which gives the court no discretion except to grant the immunity. 18 U.S.C. §§6002, 6003. The effect of sustaining Hilton's conviction in this case would be to repeal by implication the Fourth Amendment to the Constitution of the United States under the guise of "no standing". Every bank record is now subject to seizure by the United States Attorney to be used to give immunity to some and prosecute others. The total effect is that every citizen in the United States today with a bank account is subject to the prying eyes and unbridled discretion of official inquisitors who need not show

probable cause but only the power to issue illegal subpoenas designating the FBI agents of the grand jury without any authority, grand jury or statutory, and in violation of constitutional guarantees.

The trial court has become a partner in crime committed by the executive branch by the grant of immunity.

The failure to exclude the evidence and refusal to grant immunity by the courts violate "the imperative of judicial integrity". *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968); *Elkins v. United States,* 364 U.S. 206, 222, 80 S.Ct. 1437, 1447, 4 L.Ed. 2d 1669 (1960). As stated in *Terry v. Ohio, supra:*

> "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."

Judge Wright in a concurring opinion in *In re Evans,* 452 F.2d 1239 (C.A.D.C., 1971) correctly characterized the very procedure used in the instant case when he held:

> "And for a court, on petition of the executive department, to sentence a witness [or grant him immunity as in the case at bar], who is herself the victim of the illegal wiretapping, to jail for refusal to participate in the exploitation of that crime in violation of the explicit command of Section 2515 [Fourth Amendment in the case at bar] is to stand our whole system of criminal justice on its head."

Mr. Justice Brandeis in his dissent in *Olmstead v. United States,* 377 U.S. 438, 48 S.Ct. 564 (1928), cautioned:

> "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites

> anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

In *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341 (1914), it was held:

> ". . . The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
>
> "This protection is equally extended to the action of the government and officers of the law acting under it . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

Conclusion

A subpoena directs the Federal Bureau of Investigation agents to seize records at a bank as agents of the grand jury. The grand jury could not appoint the FBI its agents but in this case the grand jury was not even asked or apprised of the fact that the United States Attorney's office had prepared such a subpoena. The records were seized and several days later presented to the grand jury. One person whose records were seized was then granted immunity over his objections and motion to quash and suppress the illegally seized records. His immunized testimony and the illegally seized documents of the witness as well as those of this petitioner were then in-

troduced into evidence and given the judicial sanction of the courts.

For the reasons above set forth and to put the Fourth Amendment back into the Constitution of the United States, this petition for certiorari should be granted.

Respectfully submitted,

HAROLD GONDELMAN,
BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG,
Attorneys for Petitioner.

EXHIBIT "A"

Subpoena to Testify Before Grand Jury

UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

To Any Authorized Officer
Keystone Bank
2809 Leechburg Road
Lower Burrell, Pa.

You are hereby commanded to appear in the United States District Court for the Western District of Pennsylvania at 708 U.S. Post Office & Cthse, Seventh Avenue & Grant Street in the city of Pittsburgh FORTHWITH to testify before the Grand Jury and bring with you

BRING WITH YOU the following:

1. Copy of deposit slip dated July 17, 1972 in the amount of $78,608.09 for Account No. 6-006894 in the name of Oppenheim Company and David Oppenheim, 500 Washington Road, Pittsburgh, Pennsylvania 15228.

2. Copy of check in the amount of $18,523.49 dated July 19, 1972 and check in the amount of $13,063.64 dated July 19, 1972. An authorized bank employee is to identify to the Federal Bureau of Investigation agents what type of account the check for $18,523.49 would have been credited to.

Said records shall be produced forthwith and said microfilm examination for the copies of those records shall be conducted in the presence of the agents for the Federal Grand Jury who are any authorized Federal Bureau of Investigation agents.

This subpoena also covers any debit memoranda or any other documents relating to above two items set forth in paragraph 2.

Exhibit "A".

This subpoena is issued on application of the United States of America.

Samuel J. Orr, III, Assistant U.S. Attorney
633 U.S. Post Office & Courthouse
Pittsburgh, Pennsylvania 15219

BERNHARD SCHAFFLER,
Clerk,

Date October 1, 1974.

By .....,
Deputy Clerk.

RETURN

Received this subpoena at 5:00 P.M. at Pgh., Pa. on 10-2-74 and on 10-3-74 at 10:45 AM at L. Burrell, Pa. I served it on the within named authorized officer (Ronald L. Solomon, V. President) by delivering a copy to him, and tendering to the fee for one day's attendance and the mileage allowed by law.

Date October 3, 1974.

.....,
By ROBERT A. VOEGE, SA, FBI, Pgh.

Service Fees
Travel.....$
Services.....
Total.....$

EXHIBIT "B"

Motion to Quash Subpoenas

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

IN RE:

GRAND JURY INVESTIGATION.

Misc. 6183.

AND NOW comes DAVID OPPENHEIM, by his attorney, STANLEY W. GREENFIELD, Esquire, and moves the Court for an Order quashing subpoenas duces tecum and in support thereof represents the following:

1. By subpoena dated March 5, 1975 movant was subpoenaed to testify before a Federal Grand Jury sitting in the Western District on March 11, 1975 at 10:00 A.M. and to bring with him certain of his financial records allegedly relating to transactions which are the subject of the indictment encaptioned U.S. v. Frank C. Hilton at No. 74-302.

2. By subpoena dated March 5, 1975 any authorized officer of Keystone Bank was also subpoened to appear and produce specific records of David Oppenheim before the Federal Grand Jury sitting in Pittsburgh on March 11, 1975 at 10:00 A.M.

3. The bank records described in Paragraph 2 above were earlier the subject of a Grand Jury subpoena which was sought to be suppressed by counsel for defendant at 74-302 on grounds that said subpoena was improperly issued.

Exhibit "B".

4. Said Motion to Suppress was the basis of extended hearings before this Court and the decision of the Court denying the Motion to Suppress, but with apparent misgivings, is now the subject of a Petition for Reconsideration by the Third Circuit Court In Banc, No. 75-1158 and C.A. Misc. Record No. 75-8032.

5. The subpoenas sought to be quashed by this Motion seeks records identical to the records which are the subject of the above appeal or which are the product of leads derived from the subpoena which is the subject of the above appeal.

6. The subpoena which is the subject of the above appeal is in any event in violation of federal law. See *United States v. Miller,* 500 F.2d 751 (5th Cir. 1974).

7. In further support of the instant Motion, movant incorporates the testimony and proceedings at No. 74-302.

WHEREFORE, this Motion.

GREENFIELD & MINSKY,
/s/ STANLEY W. GREENFIELD,
Stanley W. Greenfield,
Attorney for Movant, David Oppenheim.

Order

March 10, 1975 Now, after hearing thereon, the within Motion is Denied.

/s/ GERALD J. WEBER,
District Judge.

EXHIBIT "C"

Order

IN THE UNITED STATES COURT
For the Western District of Pennsylvania

IN RE:

GRAND JURY INVESTIGATION.

DAVID OPPENHEIM:

It is the Order of this Court, in accordance with the provisions of Sections 6002 and 6003 of Title 18, United States Code, that you shall not be excused from testifying on the ground that the testimony or evidence required of you may tend to incriminate you or subject you to a penalty or forfeiture.

However, no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information), may be used against you in any regulatory, administrative or licensing proceeding or in any criminal case, except a prosecution for perjury, giving a false statement, contempt, or otherwise failing to comply with this order.

It is therefore the Order of this Court that you shall return to the Grand Jury room forthwith and answer all questions propounded to you there, as well as in any subsequent proceeding or trial which may result from the Grand Jury's current inquiry.

GERALD J. WEBER,
United States District Judge.

DATE: March 11, 1975.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 75-1441

UNITED STATES OF AMERICA,

v.

FRANK C. HILTON,

Appellant.

Appeal From the United States District
Court for the Western District
of Pennsylvania

(D.C. Criminal No. 75-104)

Argued October 16, 1975

Before Aldisert, Kalodner and Adams, *Circuit Judges.*

Harold Gondelman, Esquire, Baskin, Boreman, Wilner, Sachs, Gondelman & Craig, 10th Floor, Frick Building, Pittsburgh, Pennsylvania 15219, *Attorneys for Appellant.*

Blair A. Griffith, United States Attorney, Samuel J. Orr, III, First Assistant U.S. Attorney, Daniel H. Shapira, Assistant United States Attorney, James J. West, Assistant United States Attorney, 633 United States Post Office and Courthouse, Pittsburgh, Pennsylvania 15219, *Attorneys for Appellee.*

(Filed March 30, 1976)

Kalodner, *Circuit Judge.*

The defendant Frank C. Hilton appeals from his conviction following a non-jury trial on three counts of an indictment which respectively charged him with (1) extortion in violation of the Hobbs Act;[1] (2) willful understatement of his taxable income in his 1972 federal income tax return;[2] and (3) knowingly making a false material declaration to a grand jury.[3] He was sentenced to a 5-year prison term on the extortion and perjury counts and a 3-year prison term on the income tax count, the sentences to run concurrently.

Hilton does not here contend that the trial evidence was insufficient to sustain the trial court's guilty verdicts on the Hobbs Act, income tax fraud and perjury counts. He urges, however, that some of the evidence adduced at his trial was obtained by the government in violation of his Fourth Amendment rights via an alleged "illegal" search and seizure conducted by federal agents under cover of an alleged "illegal" subpoena *duces tecum* directed to the Keystone Bank in Lower Burrel, Pennsylvania. He contends that the district court erred in rejecting his Fourth Amendment claims when he presented them in a pre-trial motion to suppress the evidence to which they related. The district court in its Memorandum and Order denying the suppress motion,[4] held that the Keystone Bank had not asserted any "claim of violation of rights" with respect to its surrender of its records, and that Hilton "has no standing to complain."

The challenged evidence is in two categories, *viz.*, (1) records maintained by the Keystone Bank as to two loans aggregating $22,800 which it had made to Hilton and his wife,

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[1] 18 U.S.C.A. § 1951.

[2] 26 U.S.C.A. § 7206(1).

[3] 18 U.S.C.A. § 1623.

[4] The "Memorandum and Order" was filed January 30, 1975.

and (2) Keystone Bank records as to the operation of the checking account of one of its depositors named David N. Oppenheim. The bank's own loan records showed that a $18,523.49 balance due on the Hilton loans on July 19, 1972 was repaid on that date with funds emanating from the Oppenheim checking account, and the bank's records as to the Oppenheim checking account established that the latter was the source of the $18,523.49 repayment of the Hilton loans on July 19, 1972.

We are of the opinion, for reasons later developed, that the district court did not err in its holding that the defendant lacks standing with respect to his Fourth Amendment claim.

The specifics of the Hilton claim must be prefaced by the following statement of relevant background facts adduced below:

The Keystone Bank loaned $19,800 to Hilton and his wife on September 5, 1968, and $3,000 to Hilton alone on October 30, 1971.

Hilton was Secretary of Property and Supplies of the Commonwealth of Pennsylvania when the second loan was made. As earlier stated, the Hilton loans were repaid on July 19, 1972 via funds from the Oppenheim checking account in the Keystone Bank.

In the late spring of 1974, Newspaper reports that Oppenheim's payment of the Hiltons' loans was a "payoff" for Hilton's placement of state insurance with Oppenheim, an insurance broker, led to a federal grand jury investigation aimed at ascertaining whether federal criminal laws had been violated.

In July 1974, Keystone Bank records relating to loans made to Hilton and his wife were subpoenaed to the grand jury sitting in Pittsburgh, Pennsylvania. The bank records produced

in response to the subpoena disclosed that the Keystone Bank on July 19, 1972 was paid a balance of $18,523.49 then due on the Hilton loans.[5]

On August 21, 1974, Hilton appeared voluntarily before the grand jury. He testified that he had repaid the $18,523.49 balance due on his loans with $13,800.00 of his wife's savings and $6,000.00 he had received from the sale of real estate.

In September 1974 Keystone's records relating to certain accounts of Hilton and Oppenheim were subpoenaed to the grand jury. The records produced in response to that subpoena disclosed with respect to the Oppenheim account a deposit of $78,608.09 on July 17, 1972 and a check payable to the Keystone Bank for $18,523.49 dated July 18, 1972. The Hilton account records failed to show any disbursement of $8,523.49.[6]

On October 1, 1974 a third subpoena commanded "any authorized officer" of the Keystone Bank (1) "to testify before the Grand Jury and bring with you" copies of Oppenheim's $78,608.09 deposit slip of July 17, 1972, and his $18,523.49 and $13,063.64 checks dated July 19, [18] 1972; and (2) to produce "forthwith" the specified microfilms for "examination" by "the agents for the Federal Grand Jury who are any authorized Federal Bureau of Investigation agents."

The subpoena, which was captioned "Subpoena to Testify Before Grand Jury," stated that it was issued "on application of the United States of America. . . . Samuel J. Orr, III, U.S. Attorney."

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[5] Affidavit of Samuel J. Orr, III, Assistant United States Attorney, filed January 3, 1975. The Affidavit is set forth in the Appendix to the government's Brief.

[6] *Id.*

The subpoena was served on the bank on October 3, 1974 by two F.B.I. agents. In response to their demand they were given copies of the bank's microfilm records of the Oppenheim deposit slip and checks, although the subpoena only called for the agent's "examination" of the microfilms.

On October 10, 1974, the F.B.I. agents presented the microfilm copies to the grand jury which later that day returned a perjury indictment against Hilton, at No. 74-302, Criminal. The indictment charged Hilton with falsely testifying in his August 21, 1974 grand jury appearance that he had paid his $18,523.49 debt to the Keystone Bank with his own and his wife's funds.

On November 18, 1974, Hilton moved to dismiss the perjury indictment, and to suppress the evidence obtained by the F.B.I. agents in their service of the October 1, 1974 subpoena.

The motion to dismiss the October 10, 1974 indictment alleged that the United States Attorney's office had abused the grand jury process in securing the Oppenheim records by means of a "forthwith" subpoena, and the F.B.I. agents "used unlawful threats, coercion and duress to secure the subpoenaed documents forthwith."[7]

The motion to suppress alleged in substance that the October 1, 1974 subpoena was illegal in that it purportedly constituted F.B.I. agents as "agents of the 'Federal Grand Jury,' and that 'i[n] serving said subpoena duces tecum . . . said agents of the Federal Bureau of Investigation used unlawful threats, coercion and duress to secure the subpoenaed documents forthwith.' "

[7] Hilton's motion to dismiss also alleged that the United States Attorney's office had made unauthorized disclosure to a Pennsylvania legislative committee of evidence adduced in the grand jury investigation, and "prosecutorily inspired adverse publicity."

The district court held an evidentiary hearing on Hilton's two motions on December 13, 1974. The substance of the evidence adduced at that hearing may be epitomized as follows:

The October 1, 1974 subpoena was issued by Assistant United States Attorney Orr without authorization by the grand jury which was in session that day and on October 3, 1974 when the subpoena was served; the grand jury, however, was permitted to recess from October 4, 1974 until October 10, 1974 without waiting for the production of the fruits of the subpoena; Orr specified in the subpoena for "forthwith" examination by the F.B.I. agents of the bank's records as to Oppenheim's July 1972 deposit and checks because he felt "there was a danger of the records being destroyed" in light of a "close relationship" between Oppenheim and the bank by virtue of the fact that Oppenheim was vice-president of the Rockwood Insurance Company which was "the primary stockholder in the Keystone Bank;"[8] the F.B.I. agents who served the subpoena on a vice-president of the bank, Ronald A. Soloman, requested delivery to them of microfilms of the Oppenheim July 1972 deposit and checks listed in the subpoena; Soloman referred the agents' request to William R. Sutton, another vice-president; Sutton in turn phoned Abraham Fishkin, attorney for the bank, with reference to the agents' request and their expressed refusal to leave without the microfilms; Fishkin, after failing in his attempt to reach Oppenheim, instructed Sutton to deliver the microfilms "since the agents are there and will not leave the premises until you comply, rather than disrupt the bank by having you and Mr. Soloman go downtown, you let them have whatever the subpoena told you to give them."[9]

[8] N.T., pp. 36-38, December 13, 1974 hearing; App. 55a-57a.

[9] N.T., p. 76, December 13, 1974 hearing; App. 95a.

The district court entered an Order on December 18, 1974 denying Hilton's motions to suppress and to dismiss the indictment. In its Opinion accompanying that Order it held, as earlier stated, that Hilton "has no standing to complain" with respect to the issuance, service and fruits of the October 1, 1974 subpoena since it was directed to the Keystone Bank. In doing so the district court said in relevant part:

> "We, therefore, conclude that even though it might be found that the manner in which these records were obtained by the government constituted an abuse of process amounting to an illegal search and seizure, *any search which occurred was directed against the bank and not this defendant, and this defendant has no standing to complain of a seizure of evidence from another person in violation of that person's Fourth Amendment rights.*" App. p. 133a. (emphasis supplied).

On December 23, 1974, the district court revoked its December 18, 1974[10] Order and continued consideration of Hilton's suppress and dismissal motions pending submission of additional "evidentiary material" and further argument, in light of *United States v. Miller,* 500 F.2d 751 (5th Cir. 1974).[11]

On January 3, 1975, Assistant United States Attorney Orr filed an Affidavit which spelled out in greater detail the substance of his earlier testimony at the December 13, 1974 suppression hearing as to the July and September 1974 grand jury subpoenas to the Keystone Bank, and their disclosure as to the repayment of the Hilton loans on July 19, 1972, after

[10] Memorandum Opinion and Order, December 23, 1974, App. 134a.

[11] In United States v. Miller, 500 F.2d 751 (5th Cir. 1974) it was held that a *bank depositor* had standing to maintain a motion to suppress based on alleged illegal divulgence of his bank's records as to his deposits. The Fifth Circuit later affirmed this holding *en banc,* seven judges dissenting. 508 F.2d 588 (1975), *cert. granted,* 421 U.S. 1010 (1975).

Oppenheim had made a deposit on July 17, 1972, of his $78,351.91 commission on the Pennsylvania insurance policy awarded to him by Hilton, and the next day had drawn a check to the order of Keystone Bank for $18,523.49. The Affidavit also spelled out in detail Orr's suppression hearing testimony as to his issuance of the October 1, 1974 "forthwith" subpoena because of his concern that the Oppenheim July 1972 checking account records might be destroyed in light of Oppenheim's close relationship with Keystone Bank.[12] Orr's affidavit also stated that the grand jury was in session when the subpoena was issued and served, and that the evidence yielded by it was presented to the grand jury on October 10, 1974 following its return from a week's recess.

The district court denied Hilton's motions to dismiss the indictment and to suppress evidence in a Memorandum and Order filed January 30, 1975, following a hearing on January 13 and 14, 1975. In doing so it held that *"[t]he party subpoenaed* [Keystone Bank] *asserts no claim of violation of rights at this time,"* and that Hilton *"has no standing to complain."*

Hilton sought to appeal the district court's Order via a "Petition Under All Writs Act, 28 U.S.C. § 1651." The petition was denied for lack of jurisdiction on February 21, 1975.

On March 5, 1975, the grand jury separately subpoenaed Keystone Bank and Oppenheim to testify March 11, 1975 and to produce Oppenheim's July 17, 1972 deposit slip for $78,608.09[13] and Oppenheim's next day checks for $18,523.49 and $13,063.64.

[12] Orr's Affidavit is set forth in the Government's Appendix to its Brief.

[13] The $78,608.09 deposit included Oppenheim's $78,351.91 commission on the Pennsylvania Insurance policy awarded him by Hilton.

Keystone Bank complied with the subpoena. Oppenheim, however, filed a motion on March 10, 1975 to quash his subpoena. His motion was denied the same day. Oppenheim appeared before the grand jury on March 11, 1975, and pleaded his Fifth Amendment privilege. He was taken before the court which forthwith entered an Order granting him immunity and directing him to testify. Oppenheim then testified before the grand jury which later in the day returned the instant three-count indictment charging Hilton with extortion in violation of the Hobbs Act, income tax evasion and perjury. This indictment superceded the prior October 10, 1974 indictment which only charged Hilton with perjury. The earlier indictment was dismissed on motion of the government on April 7, 1975, at which time Hilton moved again to dismiss the March 11, 1975 indictment and to suppress the evidence on the ground that the subpoena power had been abused.

Oral argument was had on Hilton's motions on April 7, 1975 and they were denied the next day. The proceedings with respect to Hilton's prior motions to dismiss and suppress were incorporated into the record at the oral argument.[14]

Hilton's non-jury trial was held on April 15, 16 and 18, 1975. The notes of testimony of the December 13, 1974 hearing on Hilton's motions to suppress the evidence yielded by the October 1, 1974 subpoena, and to dismiss the prior indictment, were made part of the trial record. Hilton's grand jury testimony that he had satisfied the Keystone Bank loans with $13,000 of his wife's savings and $6,000 he had received from the sale of real estate was also introduced into evidence.

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[14] On April 11, 1975, Hilton filed a petition under the All Writs Act seeking review of the district court's April 8, 1975 Order denying his motions to dismiss and suppress. We denied his petition on April 18, 1975 at Misc. No. 75-8080.

The following original records *maintained by Keystone Bank* were also admitted into evidence:

"Demand Loan Ledger" *of Keystone Bank* with respect to each of the Hilton loans from their inception to their satisfaction;[15] *a Keystone Bank* "proof tape" of matching entries of transactions which disclosed that Oppenheim's July 18, 1972 check, payable to the bank, had been applied on July 19, 1972 to repay the $18,523.49 balance on the Hilton loans, and that Oppenheim's July 18, 1972 check for $13,063.64, payable to the bank had been disbursed as cash;[16a] and two Keystone "Payment Slips" noting satisfaction of each of the Hilton loans on July 19, 1972.[16b]

Photocopies of *Oppenheim records* admitted into evidence were:

"Exhibit No. 5"—Oppenheim's July 17, 1972 Keystone Bank deposit slip in the amount of $78,608.09, which separately listed his $78,351.91 commission on the Pennsylvania insurance policy and several other small items aggregating $256.18.

"Exhibit No. 6"—Oppenheim's July 18, 1972 check payable to Keystone Bank in the amount of $18,523.49.

"Exhibit No. 7"—Oppenheim's July 18, 1972 check payable to Keystone Bank in the amount of $13,063.64.

Hilton's joint income tax return for 1972 was also admitted into evidence as bearing on the count charging him with understatement of his taxable 1972 income. The tax return (Exhibit No. 29) listed Hilton's gross income at $29,294—$25,000 state salary, $422 dividends and net income of $3,872, from a chemical business.

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[15] Exhibit [illegible], 1a and 3.

[16a] Exhibit [illegible] 10.

[16b] Exhibit Nos. 8 and 9.

It must be noted at this juncture that Keystone Bank records pertaining to Hilton's checking account were not offered in evidence nor were Hilton's own checking account records offered.

Extended discussion of the testimony adduced is not required since Hilton has not challenged its sufficiency to sustain the guilty verdict, and he has chosen to premise his appeal on the ground that some of the evidence, *viz.*, bank records relating to his loans and the Oppenheim July 1972 deposit and checks, had been obtained via the October 1, 1974 subpoena in violation of his Fourth Amendment rights.

Oppenheim testified, in sum, that at Hilton's insistence he agreed to give Hilton a kick-back of $31,587.13 of his $78,351.91 commission on a $602,707 premium on a state insurance policy placed through [the Rockwood Insurance Company,] Oppenheim's brokerage concern;[17] Oppenheim received and deposited his commission on July 17, 1972; and on July 18, 1972 he contacted Herman Israel, president of Keystone Bank, who knew of his "arrangement with Mr. Hilton", "[i]n order to make my payment of 31 thousand some odd dollars to Mr. Hilton, and I had agreed";[18] he was then advised by Israel that $18,543.49 was owing to the bank on the Hilton loans and he drew a check for that amount and a second check for $13,063.64, payable to the Keystone Bank; he gave the two checks to Israel and "asked him to apply the one to Mr. Hilton's obligation at the bank, cash the other and give the cash to Mr. Hilton";[19] Israel had arranged for, and attended, Oppenheim's initial meeting with Hilton with reference to placement of the state insurance policy;[20] Israel also attended a later Oppenheim-Hilton meeting at which

[17] App. 311a-313a, 315a and 344a.

[18] App. 315a.

[19] App. 317a.

[20] App. 280a.

Hilton's kickback payment was discussed;[21] Israel and Oppenheim had been "close business associates . . . [f]or a long time";[22] Israel was chairman of the board of directors of Rockwood Insurance Company which he controlled, and Oppenheim was a major shareholder of the company and a member of its board of directors.[23]

It may be noted at this juncture that Israel pleaded the Fifth Amendment when he was called as a government witness.

Relevant testimony of two officers of the Keystone Bank may be epitomized as follows:

Vice-president William R. Sutton identified the *"Demand Loan Ledger"* cards of the Keystone Bank, (Exhibits 1, 1a and 3) as the *"bank's permanent record[s]"* of the Hilton loans.[24] He also testified that the bank's *"proof tape"* (Exhibit No. 10) indicated that (1) Oppenheim's $18,423.49 check, payable to the Keystone Bank, *"was applied to satisfy the Hilton loans,"* and (2) *"there was cash handed out"* for Oppenheim's $13,063.64 check, payable to the Keystone Bank.[25]

Assistant vice-president John L. Baker testified that he had on March 11, 1975, presented to the grand jury, in response to its subpoena of March 5, 1975, copies of the Keystone Bank's own records as to the Hilton loans and their repayment, and copies of the Oppenheim deposit slip and checks, earlier recited.

The March 5, 1975 subpoena called for the production by Keystone Bank of copies of Oppenheim's July 1972 deposit

[21] App. 304a.

[22] App. 341a.

[23] App. 340a-341a.

[24] App. 213a, 220a.

[25] App. 242a.

slips and two checks, and copies of the bank's records pertaining to the deposit slip and checks. The subpoena was introduced into evidence as Exhibit No. 16, over the objection of Hilton's counsel, who had also earlier unsuccessfully objected to the admission into evidence of the bank's records relating to the Hilton loans and the Oppenheim deposit and two checks, on the ground that they had originally been obtained by the government via the "illegally" issued and "illegally" served October 1, 1974 subpoena.

It must be noted parenthetically that Hilton did not testify at his trial.

Considering, as we must, the testimony, in the light most favorable to the government,[26] we find that it amply sustained the trial court's guilty verdict on the counts charging Hilton with violation of the Hobbs Act, income tax evasion, and perjury before the grand jury.

Oppenheim's testimony as to his fulfilled "kickback" deal with Hilton respecting Oppenheim's commission on the state insurance policy established violation of the Hobbs Act. *United States v. Mazzei,* 521 F.2d 639 (3d Cir. 1975), *cert. denied,* 44 U.S.L.W. 3340 (December 9, 1975). Oppenheim's payment of the $18,523.49 Hilton loans constituted taxable income to Hilton and his failure to report it in his joint 1972 federal income tax return established violation of the revenue laws. The Oppenheim payment of the $18,523.49 Hilton loans also established that Hilton perjured himself when he testified to the grand jury that *he* had repaid the loans with his, and his wife's funds.

What has been said brings us to Hilton's instant challenge to the district court's holding that "this defendant has no stand-

[26] Glasser v. United States, 315 U.S. 60 (1942); United States v. Trotter, ... F.2d ...., Nos. 75-1709-10 (3d Cir., filed January 12, 1976); United States v. DeCavalcante, 440 F.2d 1264 (3d Cir. 1971).

ing to complain of a seizure of evidence from another in violation of that person's Fourth Amendment rights,"[27] in denying Hilton's Fourth Amendment claims with respect to the October 1, 1974 subpoena directed to the Keystone Bank.

The Achilles heel of Hilton's challenge is that it is bottomed on his view that "*the bank records of the defendant were secured from the bank* by the Federal Bureau of Investigation"[28] pursuant to the October 1, 1974 subpoena. (emphasis supplied).

There is no basis in the record for Hilton's categorization of the records secured via the October 1, 1974 subpoena as "*the bank records of the defendant.*" The record inescapably establishes that the subpoena specifically related to the Oppenheim July 1972 deposit slip and two checks, and "any debit memoranda or any other documents relating" thereto, and that the F.B.I. agents who served the subpoena secured *only* copies of the Keystone Bank's microfilms of the specified Oppenheim deposit slips and checks, and the bank's own "Payment Slips," as to the payment of the Hilton loans.

The hard fact that the records secured by the October 1, 1974 subpoena were *not* "the bank records of the defendant," makes inapposite Hilton's reliance on the Fourth Amendment's provision that "[t]he right of the people to be secure in their persons, houses, *papers and effects,* against unreasonable searches and seizures . . .," and *United States v. Miller, supra,* which held the Fourth Amendment extended to the *bank records of a depositor.* (emphasis supplied).

This Court recently refused to subscribe to *Miller's* holding in *United States v. House,* 524 F.2d 1035 (1975). We there expressly ruled that a depositor "has no property interest in the

[27] "Memorandum and Order" filed January 30, 1975.

[28] "Statement of Issue Presented for Review," Brief of the Appellant.

bank's microfilms" of his account. In doing so, we said at page 1044:

> ". . . Any contention that either the fourth or fifth amendment creates for them a privacy interest in the bank's records would seem to have been put to rest by *Couch v. United States,* 409 U.S. 322, 93 S. Ct. 611, 34 L.Ed.2d 548 (1973), a case to which Judge Goldberg makes no reference in *Miller.* Certainly it would be difficult, since *Couch,* to imagine on what basis we could hold that the taxpayers, when they made their bank deposits and invoked the bank's assistance in collecting third party negotiable instruments, entered a constitutionally protected zone of privacy."

Other circuits are in accord: *United States v. Continental Bank & Trust Company,* 503 F.2d 45, 49 (10th Cir. 1974); *United States v. Gross,* 416 F.2d 1205, 1213 (8th Cir. 1969); *Harris v. United States,* 413 F.2d 316, 318 (9th Cir. 1969); *Galbraith v. United States,* 387 F.2d 617, 618 (10th Cir. 1968); *O'Donnell v. Sullivan,* 364 F.2d 43, 44 (1st Cir.), *cert. denied,* 385 U.S. 969 (1966); *Application of Cole,* 342 F.2d 5, 7 (2d Cir.), *cert. denied,* 381 U.S. 950 (1965).

The cases cited are in consonance with recent Supreme Court holdings in the general field.

In *California Bankers Assn. v. Shultz,* 416 U.S. 21 (1974), it was said at page 53:

> "We decided long ago that an Internal Revenue summons directed to a third-party bank was not a violation of the Fourth Amendment rights of either the bank or the person under investigation by the taxing authorities. See *First National Bank v. United States,* 267 U.S. 576 (1925), aff'g 295 F. 142 (SD Ala. 1924); *Donaldson v. United States, supra,* [400 U.S. 517 (1971)] at 522. '[*I*]*t is difficult*

> *to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress.' Id.,* at 537 (Douglas, J., concurring)." 416 U.S. at 53 (emphasis supplied).[29]

In *Brown v. United States,* 411 U.S. 223 (1973), it was held that the defendants had no standing to challenge the admission of evidence seized on the premises of another under a defective search warrant. In so holding, the Court said at page 229:

> "In deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary of possessory interest *in the premises;* and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." (emphasis supplied).

In *United States v. Couch,* 409 U.S. 322 (1973) it was held that a taxpayer "cannot reasonably claim, either for Fourth or Fifth Amendment purposes, an expectation of protected privacy" as to her business records in the possession of her accountant. 409 U.S. at 335-36.

In *Alderman v. United States,* 397 U.S. 165 (1969), it was held at pages 171-72 that "suppression of the product of a Fourth Amendment violation can be successfully urged *only* by those whose rights were violated by the search itself, not

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[29] In *Donaldson,* it was held that a petitioner seeking intervention in the enforcement of Internal Revenue summonses directed to petitioner's former employer for the production of employment records, had no proprietary interest in said records and therefore had no absolute right to intervene in the enforcement proceeding.

by those who are aggrieved solely by the introduction of damaging evidence." (emphasis supplied).[30]

Applying the principles stated to the instant case, we are of the opinion that the court below did not err in denying for lack of standing, Hilton's pre-trial and trial Fourth Amendment claims with respect to the government's securing of the records maintained by the Keystone Bank relating to the Hilton loans, and the bank's copies of the Oppenheim July 1972 deposit and checks, pursuant to the October 1, 1974 subpoena.

Our holding that Hilton lacks standing to challenge the legality of the October 1, 1974 subpoena makes it unnecessary for us to discuss the substantive content of that challenge.

There remains this to be said with respect to Hilton's contention that even without standing on his part "[t]he doctrine of judicial integrity requires rejection of illegally seized and tainted evidence," under the "exclusionary rule."

We are advised by the district court: "[I]t appears that without any prior application to the grand jury, or any attempt to secure its consent, or even any knowledge of the grand jury that it was being done, an Assistant United States Attorney filled out a form of a grand jury subpoena *duces tecum*, bearing the signature of the Clerk and the seal of the

[30] In United States v. Union National Bank, 371 F. Supp. 763 (W.D. Pa. 1974), *aff'd*, 506 F.2d 1053 (3d Cir. 1974), it was held that taxpayers did not have the right to intervene in a proceeding to enforce an Internal Revenue summons which required production of their records, including signature cards, ledger cards, deposit slips, microfilm of deposited items, debit and credit memoranda relating to checking accounts, financial statements, savings accounts, loan applications or certificates of deposit accounts. Relying on Donaldson v. United States, *supra*, the district court stated:

> "Donaldson is clear to the effect that the records of the bank are not the taxpayer's; nor does he have a proprietary interest of any kind in them." 371 F. Supp. at 768.

United States District Court, which commanded the party named to produce certain papers 'forthwith' to any agent of the Federal Bureau of Investigation, who was designated therein as the 'agent of the grand jury'."[31] The district court also found that "it is a fair inference that there was no intention of presenting the papers immediately to the grand jury upon their production and, therefore, the argument that a grand jury was in fact sitting is meaningless."[32]

Assuming *arguendo*, that the recited circumstances could afford a basis for a two-pronged contention[33] that (1) the Assistant United States Attorney who issued the subpoena knew or should have known that the grand jury would not be in session to examine "forthwith" the subpoenaed materials; and (2) the use of the grand jury subpoena was an improper substitute for a search warrant issued by an impartial judicial officer, we are of the opinion that Hilton lacks standing to present such contention. *Wong Sun v. United States*, 371 U.S. 471 (1963).

In *Wong Sun, supra*, it was held that the defendant lacked standing to assert a claim that evidence adduced against him was obtained by federal narcotics agents in a search of a co-defendant's home without a search and seizure warrant.

In so holding, the Court said at page 492:

> "The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial."

Our disposition in this respect should not be taken as an indication that we condone the practice utilized by the

[31] "Memorandum Opinion" December 18, 1974.

[32] "Memorandum and Order" January 30, 1975.

[33] Hilton has in fact not presented such a contention.

prosecutor in the proceedings below. We must express grave disquietude with respect to the above discussed aspects of the issuance and "forthwith" production provisions of the subpoena. Justice Brandeis' warning is as meaningful today as it was when first articulated a half century ago: "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead v. United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

While this court has recognized that federal grand juries "are for all practical purposes an investigative and prosecutorial arm of the executive branch of government," *In re Grand Jury Proceedings,* 486 F.2d 85, 90 (3d Cir. 1973), the influence of the United States Attorney's office on a federal court's grand jury is not a license to misrepresent.

Irrespective of the motivation of the prosecutor, the hard fact is that a misrepresentation was made: the subpoena commanded a forthwith presentation to the grand jury of materials at a time when the United States Attorney's office may or should have known that the grand jury would not be in session to receive the documents forthwith. Under these circumstances, the grand jury subpoena is no substitute for a proper application before a judicial officer for a search warrant. It was this egregious circumvention of Fourth Amendment procedures that probably led the district court, in denying Hilton's suppression motion—solely on the issue of standing—to observe, that "in doing so we do not rid ourselves of a chill at the base of the spine. We are old enough to remember how other democratic constitutional systems were

brought to destruction by the use of their own legal processes."

This, too, must be said:

In the instant case the grand jury, *prior to October 1, 1974,* learned from Keystone Bank records of the existence and repayment of the Hilton loans and the Oppenheim July 1972 deposit and checks, in response to the July 1974 and September 1974 subpeonas directed to the Keystone Bank, here earlier recited. That being so, the government was not foreclosed from using as evidence at Hilton's trial the Keystone Bank records here involved. *Wong Sun v. United States, supra.*

For the reasons stated the judgment of sentence imposed by the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 75-1441

UNITED STATES OF AMERICA,

v.

FRANK C. HILTON,

Appellant.

Present: Seitz, *Chief Judge*, and Kalodner, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

ALDISERT, *Judge*.

Dated: May 6 1976

APPENDIX C

Memorandum Order

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

UNITED STATES OF AMERICA,

vs.

FRANK C. HILTON.

No. 75-104 Criminal

Defendant in the within criminal action has filed a Motion to Dismiss Indictment and a Motion to Suppress Evidence. Argument on said Motions was held before the undersigned on April 7, 1975. Both Motions are hereby DENIED for reasons stated in the Opinion of December 18, 1974 and the Memorandum of January 30, 1975, both entered in the preceding criminal action at 74-302 Criminal.

In reaching this decision the court has considered the proceedings at Misc. 6184; and it is hereby ORDERED that a copy of the file at Misc. 6184 be attached as an exhibit to the clerk's memorandum of the argument held April 7, 1975.

ORDERED filed this 8th day of April, 1975.

GERALD J. WEBER,
United States District Judge.

cc: United States Attorney
Harold Gondelman, Esq.

Memorandum and Order

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

UNITED STATES OF AMERICA,

vs.

FRANK C. HILTON.

No. 74-302 Criminal

We have reconsidered the motions of defendant to dismiss the indictment and to suppress evidence in the light of *United States v. Miller,* 500 F.2d 751 (5th Cir. Sept. 3, 1974) and *United States v. Kleen Laundry and Cleaners,* 381 F. Supp. 519 (E.D. N.Y. Aug. 9, 1974).

In our opinion of December 18, 1974 on this motion there is a misstatement of fact which requires correction. We stated on page 3 and again on page 6 that the grand jury was not in session on October 3, 1974, the date of service of the "forthwith" grand jury subpoena *duces tecum.* Actually it was established that the grand jury was in fact in session on that day but was allowed to go into recess for a week without waiting for the production of these papers. We were misled by some uncertainty in the testimony as to this date.

We believe that it is a fair inference that there was no intention of presenting the papers immediately to the grand jury upon their production and, therefore, the argument that a grand jury was in fact sitting is meaningless. The point is

raised by the United States to distinguish this situation from *United States v. Miller,* where no grand jury was sitting.

There must be some reason for the requirement made in *United States v. Miller, supra,* that the grand jury be in session and we think that the reason is that the subpoena is the court's process and not the United States Attorney's process, and that the persons summoned to appear or produce records are directed by an order of the court to so appear before the grand jury.

However, the courts have recognized the decline of the grand jury's function. *In re: Grand Jury Proceedings,* 486 F.2d 85, 90 (Schofield I), see also the extensive review of the subject by Judge Weinstein in *United States v. Kleen Laundry,* cite *supra.* It is only when the United States seeks enforcement of its subpoena, or where the party served has an opportunity to apply to the court for protection that the court's control of its process comes into operation.

Here the party subpoenaed, after a telephone call to its attorney, submitted to the demand of the agents serving the document who would not leave without the documents. The party subpoenaed asserts no claim of violation of rights at this time.

It is the depositor of the bank, the present defendant, who now complains. As of now, the controlling law in this circuit is that he has no standing to complain. While *United States v. Miller, supra,* held, after full trial on the indictment, that the evidence admitted was secured without sufficient "legal process" within the meaning of the majority opinion in *California Bankers Association v. Schultz,* 416 U. S. 21 (1974), and thus required a new trial, we cannot find the full reach of the *Miller* opinion to be operative in this circuit. *Schofield I* illustrates that the Court of Appeals is aware of the use of grand jury subpoenas:

". . . although grand jury subpoenas are occasionally discussed as if they were instrumentalities of the grand jury, they are in fact almost universally instrumentalities of the United States Attorney's office or of some other investigative or prosecutorial department of the executive branch. Grand Jury subpoenas then, when they are brought before the federal courts for enforcement, for all practical purposes are exactly analogous to subpoenas issued by a federal administrative agency on the authority of a statute, without any prior judicial control" (footnote omitted) 486 F.2d at p. 90

In this light we must reaffirm our Order of December 18, 1974 denying the Defendant's Motions, although in doing so we do not rid ourselves of a chill at the base of the spine. We are old enough to remember how other democratic constitutional systems were brought to destruction by the use of their own legal processes.

ORDER

AND NOW this 30th day of January, 1975, it is ORDERED that Defendant's Motions to Dismiss the Indictment and Suppress Evidence are hereby DENIED.

GERALD J. WEBER,
United States District Judge.

cc: Richard L. Thornburgh, U. S. Attorney,
633 U. S. Post Office & Courthouse,
Pittsburgh, Pa. 15219.

Harold Gondelman, Esq.,
1018 Frick Building,
Pittsburgh, Pa. 15219.

Memorandum Opinion

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

UNITED STATES OF AMERICA,

vs.

FRANK C. HILTON.

No. 74-302 Criminal

Weber, *J.* December 23, 1974

At the time of the evidentiary hearing on defendant's motion to suppress in this case and the argument of counsel thereon, the court was unaware of the decision in *United States v. Miller,* 500 F.2d 751 (5th Cir. September 3, 1974). The case was not cited in the briefs of either counsel submitted to the court before argument. The court proceeded to determine the matter and issued its Opinion on December 18, 1974. It was only subsequent to the filing of the Opinion that the court received the letter of defendant's counsel, dated December 13, 1974, enclosing a copy of the above-cited case, as well as the supplemental brief of the United States arguing that the case should be distinguished from the present case.

The principal argument of the United States in distinguishing the present case from *United States v. Miller* is based on a statement that the Grand Jury was in session on the date of service of the "forthwith" subpoena *duces tecum* served on the bank in this case. This is contrary to the court's recollection of the testimony but in any event it was clearly

established that upon the service of the "forthwith" subpoena, the officers of the bank surrendered the requested documents to the FBI agents who had served the subpoena and were told that their appearance before the Grand Jury was not necessary. It was also clearly established that the evidentiary materials so produced were not presented to the Grand Jury until it reconvened approximately one week later.

The court's recollection of the evidence leaves it to conclude that this is an identical factual situation to that which existed in *United States v. Miller,* cite *supra.* And we believe that our prior decision must be reviewed in the light of that case. Further, in the light of *United States v. Miller* unless this court were compelled to reach a different conclusion itself it would feel compelled to certify this matter on appeal as a controlling question of law. On the other hand, if the court felt compelled to suppress this evidence the United States has its right to an interlocutory appeal on the question. We are convinced that the matter is sufficiently serious to require reconsideration.

Prior to any argument on reconsideration we will require the United States to submit in evidentiary form sufficient to establish the facts without requiring further testimony to be taken, evidence by record or affidavit as to whether the Grand Jury considering the matter of the within defendant was actually in session on the date and at the time of service of the "forthwith" subpoena *duces tecum* on the bank in question. We will also require the United States to submit evidence as to the nature and the time of the return which was made upon the subpoena to the court.

ORDER

NOW this *23rd day of December, 1974,* the Order of this court issued on the 18th day of December, 1974 denying the

motions of the defendant to suppress evidence and dismiss the indictment is hereby REVOKED, and consideration of the motions is CONTINUED pending further argument before this court upon the receipt of briefs and the evidentiary material mentioned in the foregoing Opinion.

GERALD J. WEBER,
U. S. District Judge.

cc: All counsel.

Opinion

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

UNITED STATES OF AMERICA,

vs.

FRANK C. HILTON.

No. 74-302 Criminal

Weber, *J.* December 18, 1974

Defendant moves to suppress evidence and dismiss the indictment against him on three grounds: the securing of certain documentary evidence by means of a "forthwith" subpoena *duces tecum* of a grand jury; the disclosure of grand jury evidence to an outside party; and unfavorable pretrial publicity generated by a press release from the prosecutor's office.

Taking these in the reverse order we find the pretrial publicity to be no greater than that which would have been given the indictment by the media without the press release. The defendant was a prominent public official, his public position was well known. Nothing in the prosecutor's press release went beyond the accepted guidelines for such comment, although we can see no public purpose to be served by the issuance of a press release upon the occasion of indictment. The defendant's protection must rest in the *voir dire* examination of prospective jurors.

With respect to the claim of release of grand jury testimony, it appears that the legislative committee requested the evidentiary material from the party who originally supplied it to the grand jury and that party gave its written consent to the release of such material to the legislative committee. We find no abuse of the secrecy of grand jury proceedings in such a situation.

We are concerned with the manner of production of the grand jury evidence. It appears that without any prior application to the grand jury, or any attempt to secure its consent, or even any knowledge of the grand jury that it was being done, an Assistant United States Attorney filled out a form of a grand jury subpoena *duces tecum,* bearing the signature of the Clerk and the seal of the United States District Court, which commanded the party named to produce certain papers "forthwith" to any agent of the Federal Bureau of Investigation, who was designated therein as the "agent of the grand jury. The subpoena was served upon the named bank by two Federal Bureau of Investigation agents who remained on the premises until the papers were produced to them. The bank attempted to secure some advice of its own counsel over the telephone from Pittsburgh, thirty miles away, and finally complied with the command. It was further shown that the grand jury, by whose authority the

subpoena was allegedly issued, was not in session on the day when the "forthwith" subpoena was served.

The subpoena has one saving grace. It names with particularity the items sought.

There are valid reasons for the use of a "forthwith" subpoena, the danger of the disappearance or destruction of the items of evidence specified, and the United States has alleged that they existed in this case to a degree that required some element of protection. We accept its exercise of discretion in this regard, although such an objective could be better secured by the issuance of a search warrant which interposes the protection of the independent determination of an impartial magistrate over the Fourth and Fifth Amendment rights which are invaded here. What the United States has done here is to use the form of a grand jury "forthwith" subpoena *duces tecum* as a substitute for a search warrant.

It was noted in *United States v. Kohne,* 347 F. Supp. 1178 [W.D. Pa. 1972] that when the telephone company was served with a subpoena *duces tecum* ordering it to appear with records before the next grand jury the telephone company, rather than waiting for the next grand jury, immediately supplied the requested information to the United States Attorney's Office which then turned the information over to the law enforcement officer requesting the information. Judge Marsh noted that the telephone company realized that when it produced these records it was not legally bound to do so, but that it could wait until the next grand jury session and that if it produced the records to the United States Attorney's office beforehand it did so voluntarily. On the other hand, in the instant case two FBI officers were present with the "forthwith" subpoena and would not leave until the requested materials had been delivered to them.

The Supreme Court in *Hale v. Henkel,* 201 U. S. 43 [1906] recognized that a subpoena *duces tecum* was subject to the protection of the search and seizure clause of the Fourth Amendment:

> "We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd case,* (116 U. S. 616) the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum,* against which the person, be he individual or corporation, is entitled to protection." (p. 76)

The court in *Hale v. Henkel* did find the subpoena *duces tecum* involved in that case to be illegal because it was overbroad:

> "A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms." (p. 77)

Nevertheless, *Alderman v. United States,* 394 U. S. 165 [1969] has held:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else . . .
>
> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search . . . that he allege . . . and . . . establish, that he himself was the victim of an invasion of privacy." (p. 173) (quoting *Jones v. United States,* 362 U. S. 261 [1960].

We, therefore, conclude that even though it might be found that the manner in which these records were obtained by the government constituted an abuse of process amounting to an illegal search and seizure, any search which occurred was directed against the bank and not this defendant, and this defendant has no standing to complain of a seizure of evidence from another person in violation of that person's Fourth Amendment rights.

However, we cannot come to this conclusion without making the observation that the use of a "forthwith" grand jury subpoena *duces tecum* without the prior knowledge or approval of the grand jury at a time when the grand jury was not in session, requiring immediate delivery of documents to law enforcement officers who were not specifically authorized by the grand jury to take possession of the seized material, constitutes an abuse of process of this court. A search warrant, issued by an impartial magistrate upon a showing of probable cause would have served the government's purpose of protection against destruction and would have served the Fourth Amendment requirements. We believe that the following admonition is pertinent:

> " 'The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure.' *(United States v. O'Connor,* 118 F. Supp. 248, 250-251 [D.C. Mass. 1953]). They do not recognize the United States Attorney's office as a proper substitute for the grand jury room and they do not recognize the use of a grand jury subpoena, a process of

the District Court, as a compulsory administrative process of the United States Attorney's Office." (*In re National Window Glass Workers*, 287 F.219, 225 [D.C. N.D. Ohio 1922]). *Durbin v. United States*, 221 F.2d 520, 522 [D.C. Cir. 1954].

Order

AND NOW THIS 18th day of December, 1974, the Motions of the Defendant to Suppress Evidence and Dismiss the Indictment are accordingly DENIED.

GERALD J. WEBER,
United States District Judge.

cc: Richard L. Thornburgh, U.S. Attorney,
633 U. S. Post Office & Courthouse,
Pittsburgh, Pennsylvania 15219.

Harold Gondelman, Esq.,
1018 Frick Building,
Pittsburgh, Pennsylvania 15219.

Supreme Court, U. S.
FILED
OCT 4 1976
MICHAEL RODAK, JR., CLERK

Nos. 75-1760 and 75-1761

In the Supreme Court of the United States

October Term, 1976

Frank C. Hilton, petitioner

v.

United States of America

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

Robert H. Bork,
Solicitor General,

Richard L. Thornburgh,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

NOS. 75-1760 AND 75-1761

FRANK C. HILTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 75-1760 is reported at 534 F. 2d 556 (Pet. App. A). The Memorandum and Order of the district court in that case is not reported (Pet. App. C). The judgment order of the court of appeals in No. 75-1761 (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals in No. 75-1760 was entered on March 30, 1976. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on May 6, 1976 (Pet. App. B). The judgment of the court of appeals in No. 75-1761 was entered on March 31, 1976. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on May 6,

1976 (Pet. App. B). The petitions for writs of certiorari were filed on June 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner may challenge on Fourth Amendment grounds grand jury subpoenas directed to a bank for copies of bank records relating to his accounts and the accounts of others (No. 75-1760).

2. Whether immunity was properly granted to a witness whose bank records were seized pursuant to a subpoena (Nos. 75-1760 and 75-1761).

3. Whether the jury should have been instructed that a witness who would have invoked his Fifth Amendment privilege against self-incrimination if called by either the prosecution or the defense was more available to the former because of its ability to grant immunity (No. 75-1761).

4. Whether the use of petitioner's income tax returns by the government on cross-examination violated statutes and regulations relating to the secrecy of such returns (No. 75-1761).

STATEMENT

1. Petitioner was the Secretary of the Department of Property and Supplies for the Commonwealth of Pennsylvania. In No. 75-1760, he was convicted following a non-jury trial in the United States District Court for the Western District of Pennsylvania of having violated the Hobbs Act (Count One; 18 U.S.C. 1951), of having willfully made and subscribed to an income tax return containing false statements (Count Two; 26 U.S.C. 7206(1)), and of having made a false material declaration to a duly impanelled grand jury (Count Three; 18 U.S.C. 1623). He was sentenced on Counts One and Three to five years' imprisonment, with eligibility for parole after one year, and on Count Two to three years' imprisonment, the sentences to run concurrently. The court of appeals affirmed (No. 75-1760 Pet. App. A; 534 F. 2d 556).

In No. 75-1761, petitioner was convicted following a jury trial in the United States District Court for the Middle District of Pennsylvania of having violated the Hobbs Act, 18 U.S.C. 1951. He was sentenced to a five-year term of imprisonment, to run concurrently with the sentence imposed by the United States District Court for the Western District of Pennsylvania in No. 75-1760. The court of appeals affirmed without opinion (No. 75-1761 Pet. App. A).

2. The relevant facts adduced at trial in No. 75-1760 are fully set forth in the opinion of the court of appeals (No. 75-1760 Pet. App. A, pp. 21-33). In brief, they show that petitioner and his wife borrowed $19,800 from the Keystone Bank in Lower Burrell, Pennsylvania, on September 5, 1968. An additional $3,000 was loaned by the bank to petitioner on October 30, 1971, by which time he was Pennsylvania State Secretary of Property and Supplies. Records maintained by the bank indicated that on July 19, 1972, there was a balance due on petitioner's loans of $18,523.49 and that the balance was repaid on that date with funds from the account of another depositor, David N. Oppenheim. Newspaper accounts appearing late in the spring of 1974 alleged that Oppenheim's payments of petitioner's loans were part of a "payoff" in exchange for the placement by petitioner of state insurance policies with Oppenheim, who was an insurance broker. This led to a federal investigation of petitioner's activities.

In July 1974, a federal grand jury in Pittsburgh subpoenaed the bank records relating to petitioner's loan transactions. The subpoenaed records showed that the loans had been repaid on July 19, 1972. Petitioner appeared before the grand jury and explained that payment had been made with funds obtained from his wife and from the sale of real estate. Additional bank records were subpoenaed in September 1974, which refuted petitioner's testimony by showing that payment of the loans came from Oppenheim's account. Records of Oppenheim's accounts were subpoenaed by the grand jury; they showed that Oppenheim had arranged for repayment of petitioner's loans. A third subpoena for Oppenheim's bank records and bank records of the loans to petitioner was delivered to the bank in October 1974. On the basis of the subpoenaed records, the grand jury returned an indictment against petitioner for perjury before the grand jury.

Petitioner moved to dismiss the indictment and suppress the evidence obtained pursuant to the October subpoena, claiming that the information had been obtained by coercion, threats, and duress on the part of the FBI agents who had served the subpoena and that the subpoena had been issued without authority.[1] After an evidentiary hearing, the district court denied the motions on the ground that petitioner lacked standing. Additional subpoenas were served on the bank in March 1975.

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[1]The basis for this contention was the fact that the subpoena, which required production of the records "forthwith," had been issued by the prosecutor and had designated the F.B.I. agents as agents of the grand jury without the grand jury's knowledge, and had called for the records to be delivered on a date when the grand jury would not be sitting.

A motion by Oppenheim to quash the subpoenas for his bank records was denied. He thereupon refused to testify before the grand jury on Fifth Amendment grounds, whereupon he was granted immunity (No. 75-1760 Pet. App. A, p. 28). Oppenheim then testified before the grand jury, which thereafter returned a superseding three-count indictment, upon which petitioner ultimately was convicted, charging petitioner with extortion in violation of the Hobbs Act, income tax evasion, and perjury. Petitioner once again moved to dismiss and suppress, on essentially the same grounds as before. After oral argument, the motions were denied.

A non-jury trial followed. Various original bank records maintained by the bank were introduced at trial, as were photocopies of certain documents relating to Oppenheim's account and a copy of petitioner's income tax return for 1972. No records relating to petitioner's checking account were offered in evidence (No. 75-1760 Pet. App. A, pp. 28-30). The testimony at trial showed that Oppenheim had agreed to give petitioner a kickback of $31,587.13 of his commission of $78,351.91 on insurance purchased by the State through Oppenheim's firm and that the Keystone bank was used for this transaction.

3. In No. 75-1761, the evidence showed that petitioner arranged to have Anthony J. Trucco,[2] former Director of Insurance for the Commonwealth of Pennsylvania, place an autofleet insurance policy with Charles W. Ohle of the Ohle Insurance Company in order to obtain kickbacks from the premiums on that policy. Petitioner met with Trucco, Ohle, and a vice-president of the

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[2]Prior to trial, Trucco pleaded guilty to violating 18 U.S.C. 1951.

insurance marketing company to determine the commission and to place the policy through the broker. Ohle agreed to pay petitioner and Trucco a 6% kickback on the premium on the policy (as opposed to calculating the kickback as a percentage of the commission), which resulted in a net income of $72,000 to Trucco and $74,000 to petitioner.

Petitioner testified that he did not receive any kickbacks from Ohle and attempted to portray himself as a highly successful businessman without any financial concerns. The government rebutted this testimony on cross-examination by reference to petitioner's income tax returns. However, these returns were not introduced into evidence.

ARGUMENT

1. In No. 75-1760, petitioner contends (Pet. 7-11) that the October subpoena was illegal and resulted in the unlawful seizure of both his bank records and those of David Oppenheim. This contention is foreclosed by *United States* v. *Miller*, No. 74-1179, decided April 21, 1976.[3]

2. Petitioner contends (No. 75-1760 Pet. 11; No. 75-1761 Pet. 8) that it was improper for the government to grant immunity to Oppenheim, who testified at both trials, since the government's knowledge of Oppenheim's

[3]Petitioner attempts to distinguish this case from *Miller* by bringing it within the holding of the California Supreme Court in *Burrows* v. *Superior Court*, 13 Cal. 3d 238, 529 P. 2d 590. Unlike *Burrows*, however, this case does not involve informal oral requests for information, but rather involves the production of documents pursuant to a grand jury subpoena. The subpoena in *Miller* was claimed to be defective for reasons similar to those alleged by petitioner here (see slip op. 3). Thus, there is no basis for distinguishing this case from *Miller*.

involvement with petitioner in the kickback scheme was based upon the allegedly illegally seized bank records.

But, since petitioner does not have a sufficient Fourth Amendment interest to challenge the validity of the subpoena and alleged seizure of records, see *Miller*, *supra*, he similarly lacks sufficient interest to complain that Oppenheim's testimony is the fruit of the asserted illegality. We note, moreover, that third parties generally lack standing to challenge the grant of immunity to prospective witnesses. See *United States* v. *Braasch*, 505 F. 2d 139, 146-147 (C.A. 7), certiorari denied, 421 U.S. 910; *United States* v. *Lewis*, 456 F. 2d 404 (C.A. 3); *Lopez* v. *Burke*, 413 F. 2d 992 (C.A. 7); *Bowman* v. *United States*, 350 F. 2d 913 (C.A. 9). Thus, petitioner is unable to sustain his contention concerning the grant of immunity to Oppenheim.

3. Petitioner also contends (No. 75-1761 Pet. 9) that the refusal of a potential witness, Herman J. Israel,[4] to testify at trial on behalf of either the defense or the prosecution because of his Fifth Amendment privilege against compelled self-incrimination was grounds for a "missing witness" instruction, since the government, unlike the defendant, had the ability to immunize the witness and thereby to make him available.[5] However, as the District of Columbia Circuit has correctly stated, the "large array of considerations which enter into the relatively rare use of immunity grants indicates that

[4]Israel was a bank officer at Keystone who aided in the handling of kickback payments to petitioner (No. 75-1760 Pet. App. A, pp. 30-31).

[5]At the close of the defense case, the parties stipulated that if Israel were called he would have refused to testify.

government reluctance to use this power cannot reasonably be equated to the failure of a litigant to produce an otherwise available witness." *Morrison* v. *United States*, 365 F. 2d 521, 524; see also *Bowles* v. *United States*, 439 F. 2d 536, 541-542 (C.A. D.C.). Denial of the requested instruction was therefore proper, and the court of appeals correctly rejected petitioner's contention (No. 75-1761 Pet. App. A).

4. Finally, petitioner contends (No. 75-1761 Pet. 10-11) that the possession and use of his federal income tax returns by the government violated applicable statutes and regulations. At trial, evidence was adduced by the defense in an attempt to show that petitioner had no financial motivation to violate the Hobbs Act. Petitioner asserted, for example, that he was a successful businessman prior to taking his position with the State and that he was independently wealthy. These assertions were contradicted by petitioner's tax returns, which failed to show petitioner as a successful businessman or as a person with substantial income from securities; rather, they showed petitioner as in need of money. Information obtained from these tax returns was introduced into evidence, although the returns themselves were not introduced. Use of income tax returns for such a purpose is proper and has been approved by the courts. See, *e.g.*, *United States* v. *Greenlee*, 517 F. 2d 899, 904-905 (C.A. 3); *United States* v. *Gross*, 511 F. 2d 910, 917-918 (C.A. 3).

When the government commenced its investigation of petitioner, it requested and received from the Internal Revenue Service copies of petitioner's federal income tax returns for 1970-1973.[6] The returns were obtained

[6]Petitioner based his 1970 tax return on the income averaging method of computation; therefore, the government was provided with information concerning preceding years as well.

pursuant to the United States Attorney's authority as set out in 26 C.F.R. 301.6103(a)-1(h). The procedures employed by both the United States Attorney's Office and the IRS were in compliance with the prevailing regulations, and thus the returns could properly be used at trial. *Laughlin* v. *United States*, 474 F. 2d 444, 453, n. 12 (C.A. D.C.), certiorari denied, 412 U.S. 941; *United States* v. *Tucker*, 316 F. Supp. 822 (D. Conn.).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

ROGER A. PAULEY,
IVAN MICHAEL SCHAEFFER,
Attorneys.

OCTOBER 1976.

DOJ-1976-10